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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

AUG - 4 1993

In re Applications of
MARTHA J. HUBER, et al.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MM Docket No. 93-52
File Nos. BPH-911114ME,
et al.

TO: Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE ISSUES

Martha J. Huber (Huber), by her attorneys, now opposes the "Motion to Enlarge Issues Against Martha J. Huber" filed by Staton Communications, Inc. (Staton) on July 22, 1993.

Staton asks the Presiding Judge to specify an issue to determine whether Huber made misrepresentations or lacked candor when she certified that she was financially qualified. The Presiding Judge has already considered and rejected such a request filed by Midamerica Electronics Service, Inc. (Midamerica). Memorandum Opinion and Order, FCC 93M-314 (released June 1, 1993). While the Presiding Judge added financial qualifications issues, he refused to specify a misrepresentation issue. He wrote:

The motions are based solely on inferences to be drawn from a bank letter and there are no affidavits which reflect facts sufficient to raise a substantial question of an intended misrepresentation.

Id. at ¶ 2. Thus, unless Staton's petition contains new concrete evidence that Huber misrepresented facts or lacked

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candor with respect to her financial certification, the petition must be denied as contrary to the Presiding Judge's earlier ruling. See Section 1.106(a)(1) of the Commission's rules (petitions for reconsideration of interlocutory actions will not be entertained). In fact, Staton provides no such evidence, and its motion must be denied.

Staton provides no competent evidence that Huber knew her bank letter was defective or that her banker Leo Tierney had no intention of loaning Huber the funds needed to construct and to operate her station. Indeed, Mr. Tierney has sworn that:

Since October, 1991 and continuing date,
it has been and continues to be the
present firm intention of the Bank to
make the loan to Ms. Huber.

See the Affidavit of Leo Tierney and associated letters attached to this opposition.¹ In his May 5, 1993 letter to Ms. Huber, he writes:

you have been a customer of this bank for
over twenty-five years, and this bank was
well aware of your financial condition in
October 1991 and remains familiar with
your financial condition today.

Mr. Tierney's affidavit constitutes persuasive evidence that the bank was familiar with Huber and that the bank letter was not an accommodation.

Staton's basis for arguing that Huber misrepresented her financial qualifications is not clear. Staton's argument

¹ The original affidavit of Mr. Tierney will be submitted at hearing. The affidavit submitted with this opposition is a true and correct copy.

appears to be that because Huber filled out a financial statement on the bank's form on November 11, 1991, it necessarily follows that the bank was unfamiliar with her financial condition before that date. That argument is illogical speculation and surmise which does not meet the requirements of Section 1.229(d) of the Commission's rules. Just because a financial statement was prepared in November 1991 does not mean that the statement was the first ever prepared. It is also completely contrary to Mr. Tierney's sworn statement that the bank was familiar with Huber's financial condition in October 1991.

Staton apparently misapprehends the scope of the documents Huber had to produce. The Presiding Judge denied Brent's request that Huber produce all documents relating to Huber's relationship with the bank prior to 1991. He limited that particular request to documents Huber relied upon in certifying (i.e., the bank letter) and "those documents relied upon by Huber to establish a banking relationship." Order, FCC 93M-386 (released June 21, 1993). Huber produced the November 11, 1991 financial statement so that the parties would have an accurate picture of her financial condition at the time of certification. She was not required to produce every financial statement or other piece of paper relating to her relationship with the bank.

In order to justify its requested issue, Staton was required to make a prima facie case that Huber intended to deceive the Commission. Staton has not offered any affidavits

by persons with personal knowledge or materials which may be officially noticed which would show that Huber intended to deceive the Commission. The mere fact that Huber's bank letter may arguably have been deficient would not, by itself, demonstrate an intent to deceive the Commission. See Georgia Public Telecommunications Commission, 7 FCC Rcd 2235, 70 RR 2d 1309, 1315 (Rev. Bd. 1992) (the fact that an applicant was not financially qualified at certification time is an insufficient basis for disqualifying it under a financial certification issue). Staton has not shown one defect in Huber's financial proposal over and above those perceived by the Presiding Judge when he specified financial qualifications issues.² The Presiding Judge has not found any evidence of intent to deceive, and Staton offers none.

Staton's request for a financial misrepresentation issue is fundamentally different from Huber's request for a financial misrepresentation issue against Staton. Staton offers incompetent speculation; Huber offered sworn deposition testimony which showed that Mildred Staton had no basis for her financial certification. Huber's petition was based on new evidence, and the Presiding Judge had not previously considered a request for a misrepresentation issue against Staton. Staton recycles old arguments that were previously found insufficient to justify a character issue. Huber has offered specific and un rebutted evidence from her banker that

² Huber does not admit that there are any defects in her bank letter. She believes the record will show that she has been continuously financially qualified since she filed her application.

he was familiar with her financial condition when he wrote the letter. Ms. Staton, on the other hand, had no basis for certifying because she had no bank letter and had not spoken with the bank at the time she certified. Any suggestion that the two situations are similar must be rejected.

In essence, Staton is merely repeating prior arguments that Huber is not financially qualified. It will have every opportunity to make a record supporting that assertion under the existing financial qualifications issue. It has not offered any competent evidence of an intent to deceive the Commission, however, and it has totally ignored the pertinent evidence.

Accordingly, Huber asks the Presiding Judge to deny Staton's "Motion to Enlarge Issues Against Martha J. Huber".

Respectfully submitted,

MARTHA J. HUBER

By Morton L. Berfield
Morton L. Berfield

By John J. Schauble
John J. Schauble

Cohen and Berfield, P.C.
1129 20th Street, NW, #507
Washington, DC 20036
(202) 466-8565

Her Attorneys

Date: August 4, 1993

County of Floyd)
)
State of Indiana) ss:

AFFIDAVIT OF LEO TIERNEY

Leo Tierney, being first duly sworn, deposes and says as follows:

1. I am Senior Vice President of PNC Bank, Indiana, Inc. (formerly Citizens Fidelity Bank and Trust Company Indiana) in New Albany, Indiana.

2. The attached letters of October 29, 1991, May 5, 1993 and June 3, 1993 to Ms. Martha J. Huber, were prepared and executed by me, and the information and representations contained therein are true and correct to the best of my knowledge and belief. The change in the name of the Bank from Citizens Fidelity Bank and Trust Company Indiana to PNC Bank, Indiana, Inc. occurred February 8, 1993.

3. Since October, 1991 and continuing to date, it has been and continues to be the present firm intention of the Bank to make the loan to Ms. Huber as reflected in the attached letters.


Leo Tierney

Subscribed and sworn to before me this 2nd. day
of July, 1993.


Notary Public

My Commission expires: 2-17-95



Citizens Fidelity Bank

October 29, 1991

Martha J. Huber
1927 Plum Hill Way
Floyds Knobs, Indiana 47119

Dear Ms. Huber:

It is our understanding you are filing an application with the Federal Communications Commission (FCC) for a construction permit for a new FM broadcast station in New Albany, In. This letter is to inform you that in the event you are awarded the authorization to construct the station and subject to the provisions outlined below, this bank would be interested in loaning up to \$350,000 for the purpose of constructing and operating the station.

The loan would be for a period as long as two to five years with the interest at a percent increment above the bank's prime rate, subject to change from time to time. Principal payment would be deferred for the first year with equal monthly or quarterly payments thereafter. The collateral for the loan would be all the tangible assets of the station.

We understand that at this stage of the process the FCC does not require a contractually binding commitment, and this letter is not such a loan commitment. We do intend by this letter to assure you and the FCC of our interest in assisting you to construct and operate the station in question, provided of course, that the funding of the amount indicated, or any part thereof, will be subject to formal approval by the bank after the bank's review of your financial condition at the time and the execution of a loan agreement incorporating those terms and conditions that we may deem appropriate and similar to which we customarily require in an agreement of this type.

Sincerely,

Leo Tierney
Senior Vice President

CLT/dmp

May 5, 1993

PNCBANK

**Martha J. Huber
1927 Plum Hill Way
Floyds Knobs, Indiana 47119**

Dear Ms. Huber:

This letter will amplify upon my letter of October 29, 1991, in which our bank provided you with assurance of our intention to loan you up to \$350,000 to construct and to operate your proposed FM broadcast station in New Albany, Indiana.

First, this will confirm that you have been a customer of this bank for over twenty five years, and this bank was well aware of your financial condition in October 1991 and remains familiar with your financial condition today.

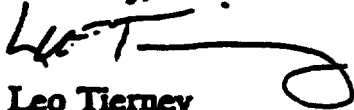
The purpose of my October 29, 1991 letter was to provide you with assurance of our intention to make the requested loan at the time your application is granted. As stated in the letter, the letter was not a contractually binding commitment, and no such commitment was made. However, based upon the bank's knowledge of your financial condition, we provided you with assurance that financing would be available, and you still have that assurance.

As noted in the letter, the interest on the loan would be one percent (a percent increment) above the bank's prime rate, subject to change from time to time. The bank's present prime rate is 6.00% and in October 1991, the bank's prime rate was 8.00%.

When I wrote that the loan "would be for a period as long as two to five years" I meant that a loan period of a minimum of two years and a maximum of five years would be acceptable to the bank. The exact term of the loan will be decided when the loan is made.

In short, the letter I wrote on October 29, 1991 remains valid and in effect, subject to the conditions contained in that letter.

Sincerely,



**Leo Tierney
Senior Vice President
PNC Bank, Indiana, Inc.
(Formerly Citizens Fidelity
Bank, Indiana)**

PNCBANK

June 3, 1993

Ms. Martha J. Huber
1927 Plum Hill Way
Floyds Knobs, IN 47119

Dear Judy:

In response to your request that we provide clarification of the change in name of this bank, the facts are as follows. On October 24, 1991, this bank was named Citizens Fidelity Bank, Indiana, an Indiana corporation wholly owned by Pittsburgh National Corporation, a bank holding company. In February of 1993, the corporate name of Citizens Fidelity Bank, Indiana was changed to PNC Bank, Indiana, Inc. There has been no change in bank ownership, but only a name change, and there has been no effect on the bank letter provided you.

Sincerely,



Leo Tierney
Senior Vice President
PNC Bank, Indiana, Inc.
(Formerly Citizens Fidelity Bank, Indiana)

CERTIFICATE OF SERVICE

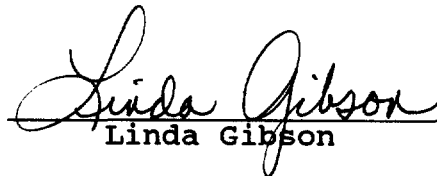
I, Linda Gibson, do hereby certify that on the 4th day of August 1993, a copy of the foregoing "Opposition To Motion To Enlarge Issues Against Martha J. Huber" was sent first-class mail, postage prepaid to the following:

James Shook, Esq.*
Hearing Branch
Federal Communications Commission
2025 M Street, NW, Room 7212
Washington, DC 20554

John Wells King, Esq.
Haley, Bader & Potts
4350 N. Fairfax Drive, #900
Arlington, VA 22203-1633
Counsel for Rita Reyna Brent

Bradford D. Carey, Esq.
Hardy & Carey
111 Veterans Memorial Blvd., #255
Metairie, LA 70005
Counsel for Midamerica Electronics Service, Inc.

Donald J. Evans, Esq.
McFadden Evans & Sill
1627 Eye Street, NW, Suite 810
Washington, DC 20006
Counsel for Staton Communications, Inc.


Linda Gibson

* Hand Delivered